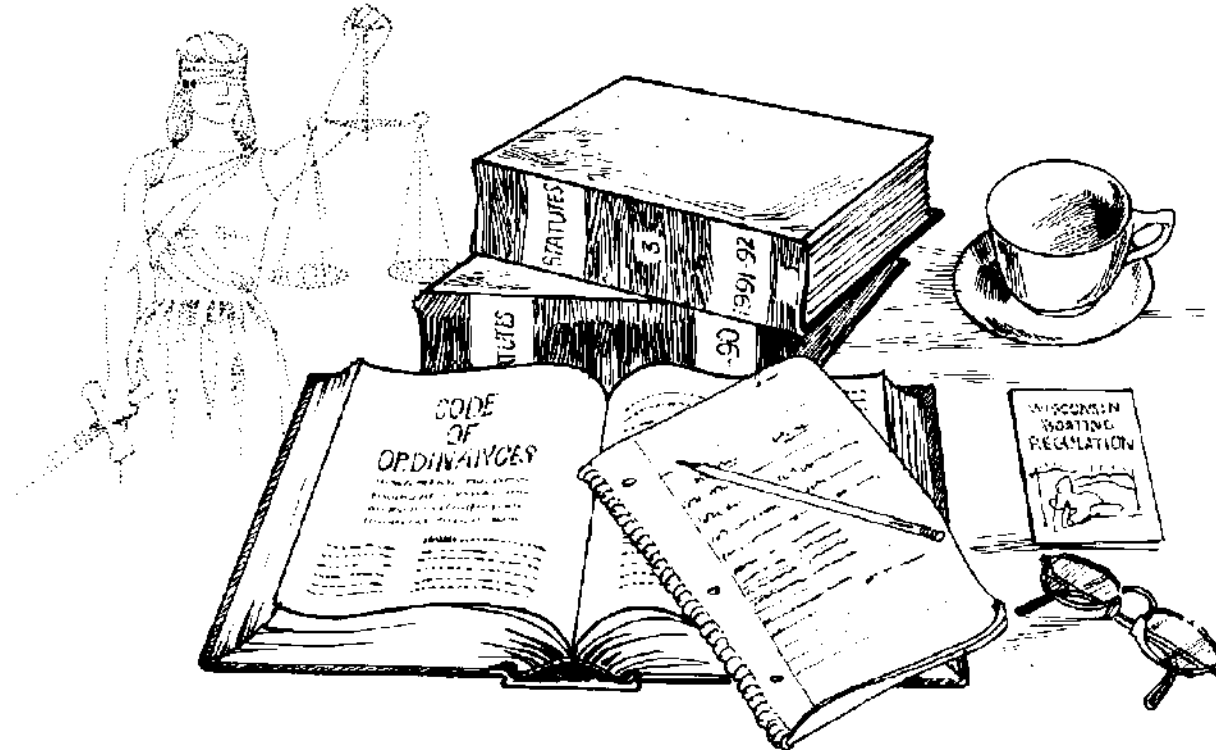


# Conditional Uses



Balancing Community Values, Local Discretion, and New State Rules

Rebecca Roberts  
Center for Land Use Education  
UW-Stevens Point/Extension



Center for Land Use Education  
College of Natural Resources  
University of Wisconsin-Stevens Point

# Zoning

## Counties

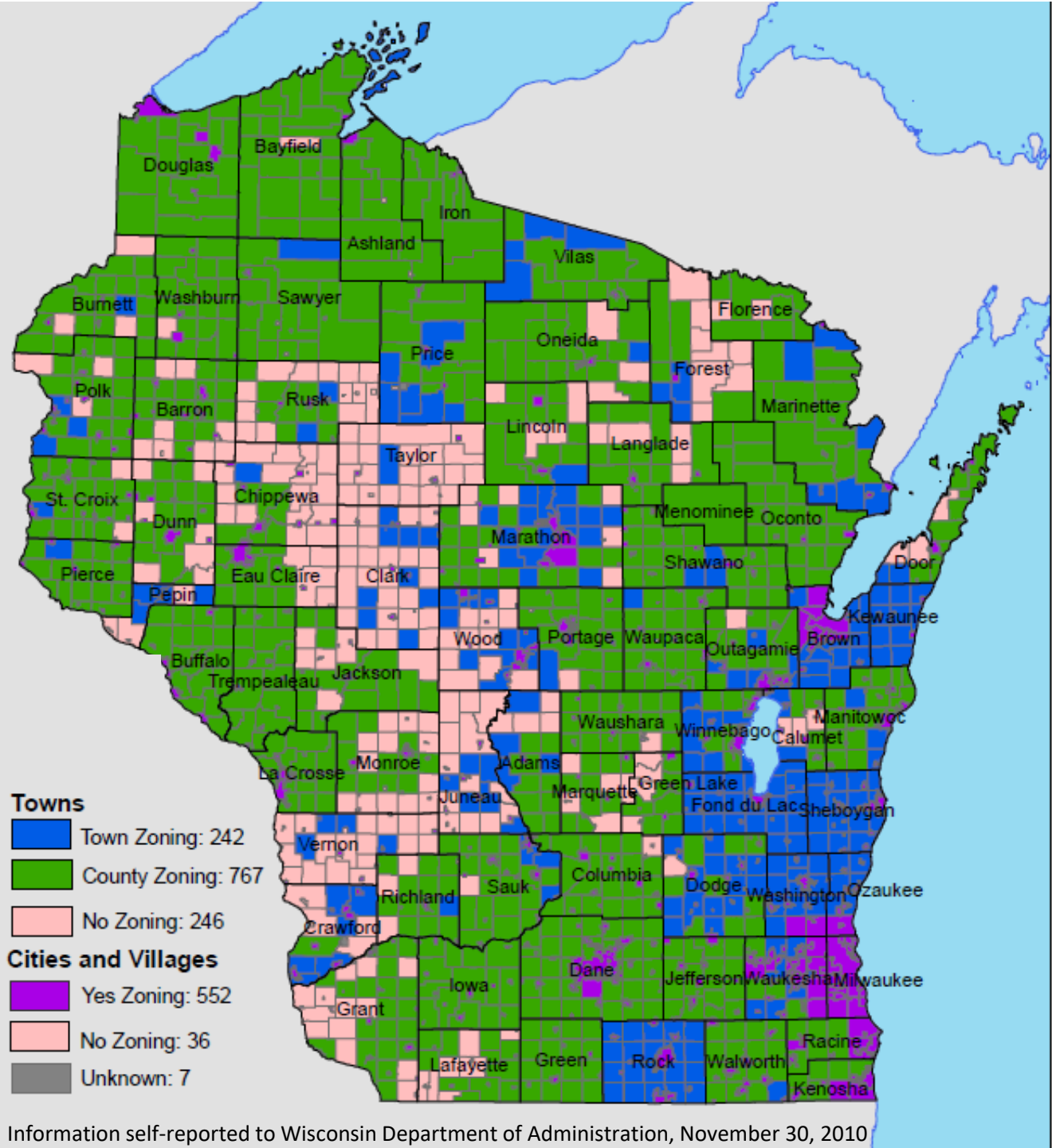
- Required to administer shoreland/wetland zoning
- May adopt general zoning in unincorporated areas

## Towns

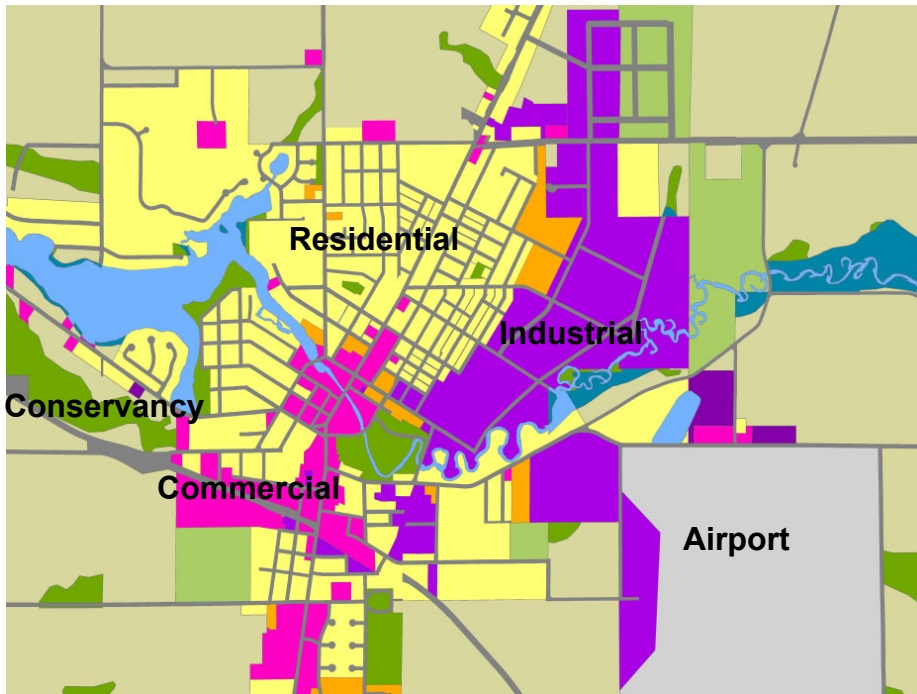
- May adopt general zoning following adoption of village powers or if no county zoning

## Cities/Villages

- May adopt general zoning
- May adopt extra-territorial zoning extending 1.5-3 miles beyond boundaries
- May have shoreland or floodplain zoning - required in some circumstances



Information self-reported to Wisconsin Department of Administration, November 30, 2010

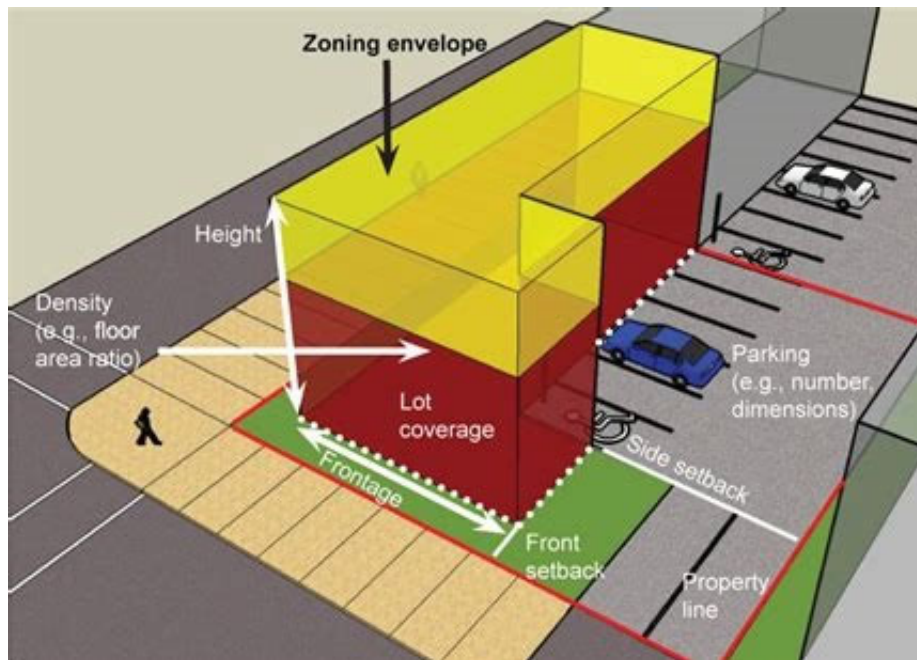


A zoning ordinance contains two parts:

Zoning Map – divides the community into districts

Text – describes:

- purpose of the regulations
- uses for each district
- dimensional standards (lot size, density, setbacks, etc.)
- other requirements (parking, signage, landscaping, etc.)



# Uses for each district:

## Permitted Use

Use is listed and allowed by right in all parts of the zoning district

Granted by zoning administrator

## Conditional Use

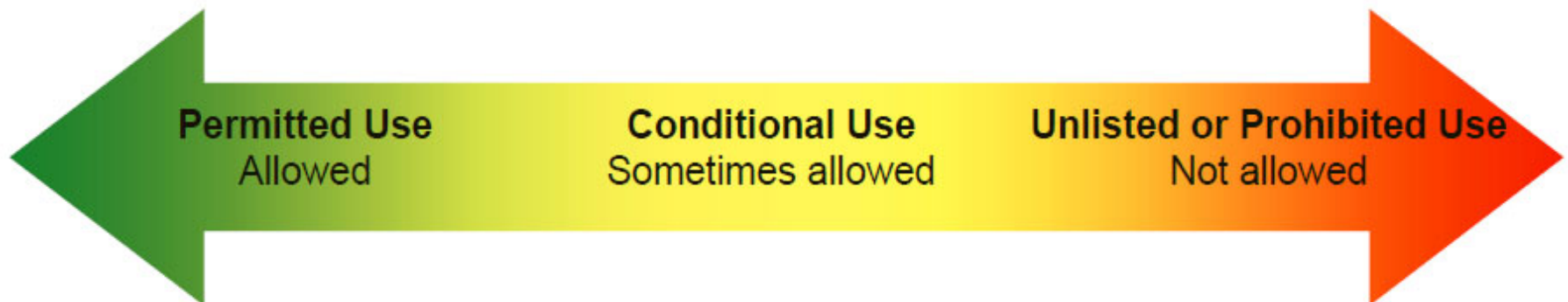
Use is listed for the district and may be allowed if suited to the location

Decided by zoning board, plan commission, or governing body

## Prohibited Use

Use is not listed for the district or is expressly prohibited

May apply for rezone or use variance, if allowed



# Ex. Residential District

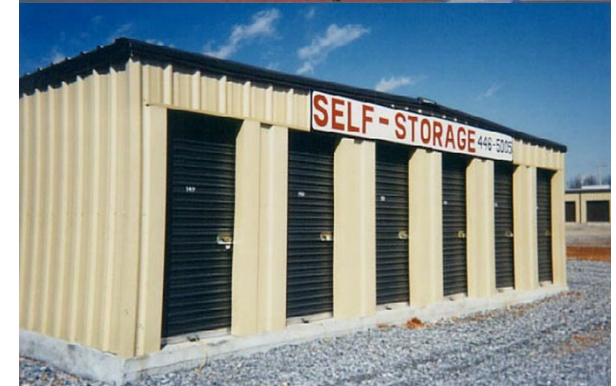
## Permitted Uses



## Conditional Uses



## Prohibited Uses



DEPARTMENT OF COMMERCE  
HERBERT HOOVER, SECRETARY

# A STANDARD STATE ZONING ENABLING ACT

UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING  
REGULATIONS

BY THE  
ADVISORY COMMITTEE ON ZONING

APPOINTED BY SECRETARY HOOVER

CHARLES B. BALL . . . . .	Secretary-Treasurer, City Planning Division, Sanitary Engineer. American Society of Civil Engineers.
EDWARD M. BASSETT . . . . .	Counsel, Zoning Committee of New York. Lawyer.
ALFRED BETTMAN . . . . .	Director, National Conference on City Planning. Lawyer.
IRVING B. HIETT . . . . .	Ex-President, National Association of Real Estate Boards. Realtor.
JOHN IHLDER . . . . .	Manager, Civic Development Department of the Housing Consultant. Chamber of Commerce of the United States.
MORRIS KNOWLES . . . . .	From the Chamber of Commerce of the United States; Chairman, City Planning Division, Consulting Engineer. American Society of Civil Engineers.
NELSON P. LEWIS* . . . . .	From the National Conference on City Planning and National Municipal League; Past Presi- dent, American City Planning Institute.
J. HORACE McFARLAND . . . . .	Ex-President, The American Civic Association. Master Printer and Civic Investigator.
FREDERICK LAW OLMSTED . . . . .	Ex-President, The American Society of Land- scape Architects; Ex-President, American City Planning Institute. Landscape Architect.
LAWRENCE VEILLER . . . . .	Secretary and Director, The National Housing Housing Expert. Association.

\* Deceased.

JOHN M. GRIES

Chief, Division of Building and Housing, Bureau of Standards  
Department of Commerce



[Revised Edition, 1928]

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1926

- 1920s – Standard state zoning enabling acts authorize the zoning board of adjustment to make “special exceptions” to the terms of the zoning ordinance.
- 1960s – “Conditional uses” widely accepted as a way to add flexibility and discretion.
- 1973 – CUPs addressed by WI Supreme Court – synonymous with special exceptions. Case law appears in footnotes.
- 2017 – Conditional uses defined in state statutes related to zoning.

# Long list of court cases referenced in footnotes

- Wis. Stat. 62.23(7)(e)1. allows a municipality to provide by ordinance that the municipal governing body has exclusive authority to consider special exception permit applications; the board of appeals retains exclusive authority absent such ordinance. *Town of Hudson v. Hudson Town Board of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990).
- Wis. Stat. 60.65(3) requires that the authority of a town board of adjustment to grant conditional use permits be contained in the town zoning ordinance. There is no statutory authority for a town board of adjustment to hear appeals from decisions of town boards granting or denying conditional use permits. *Magnolia Township and Western Rock County Citizens Against Factory Farming v. Town of Magnolia*, 2005 WI App 119, 284 Wis. 2d 361, 701 N.W.2d 60, 04-1591
- Though a conditional use permit was improperly issued by a town board, rather than a board of appeals, the permit was not void when the subject property owner acquiesced to the error for many years. *Brooks v. Hartland Sportsman's Club*, 192 Wis. 2d 606, 531 N.W.2d 445 (Ct. App. 1995).
- When reviewing a decision to grant or deny a conditional use permit, a county board of adjustment has the authority to conduct a de novo review of the record and substitute its judgment for the county zoning committee's judgment. Moreover, under the applicable state statute, a board has authority to take new evidence. *Osterhues v. Board of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228, 698 N.W.2d 701, 03-2194.
- The decision to grant a conditional use permit (CUP) is discretionary. The burden is on the party seeking a CUP to establish that it has met the conditions. *Earney v. Buffalo County Board of Adjustment*, 2016 WI App 66, 371 Wis. 2d 505, 885 N.W.2d 167, 15-1762.
- General, rather than explicit, standards regarding the granting of special exceptions may be adopted and applied by the governing body. The applicant has the burden of formulating conditions showing that the proposed use will meet the standards. Upon approval, additional conditions may be imposed by the governing body. *Kraemer & Sons v. Sauk County Adjustment Bd.* 183 Wis. 2d 1, 515 N.W.2d 256 (1994).
- Unless the zoning ordinance provides otherwise, a court should measure the sufficiency of a conditional use application at the time that notice of the final public hearing is first given. *Weber v. Town of Saukville*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997), 94-2336.
- A variance authorizes a landowner to establish or maintain a use prohibited by zoning regulations. A special exception allows the landowner to put the property to a use expressly permitted but that conflicts with some requirement of the ordinance. The grant of a special exception does not require the showing of hardship required for a variance. *Fabyan v. Waukesha County Board of Adjustment*, 2001 WI App 162, 246 Wis. 2d 851, 632 N.W.2d 116, 00-3103.
- Although a county's ordinance used the term "variance" to describe an exception to the setback standard, it did not have the technical legal meaning commonly used in a zoning context. Rather, under the terms of the ordinance, a "variance" could be granted as part of the conditional use permit process, not as a separate determination based on the demonstration of a hardship. *Roberts v. Manitowoc County Board of Adjustment*, 2006 WI App 169, 295 Wis. 2d 522, 721 N.W.2d 499, 05-2111.
- An amended PUD ordinance that allowed the placement of a PUD in any district, subject only to the approval of the town board as a conditional use, was invalid as it allowed the town to rezone without county board approval. *City of Waukesha v. Town of Waukesha*, 198 Wis. 2d 592, 543 N.W.2d 515 (Ct. App. 1995), 94-0812.
- An existing conditional use permit (CUP) is not a vested property right and the revocation of the permit is not an unconstitutional taking. A CUP merely represents a species of zoning designations. Because landowners have no property interest in zoning designations applicable to their properties, a CUP is not property and no taking occurs by virtue of a revocation. *Rainbow Springs Golf Company, Inc. v. Town of Mukwonago*, 2005 WI App 163, 284 Wis. 2d 519, 702 N.W.2d 40, 04-1771.
- Wis. Stat. 62.23(7a) authorizes transfer of zoning administration and enforcement to cities and villages upon enactment of an interim extraterritorial ordinance. Filing an application for a conditional use permit prior to adoption of the interim ordinance did not prevent the transfer of decision making; the applicant had no vested right by virtue of having requested a permit whose issuance was discretionary. *Village of DeForest v. County of Dane*, 211 Wis. 2d 804, 565 N.W.2d 296 (Ct. App. 1997), 96-1574.
- A conditional use permit did not impose a condition that the conditional use not be conducted outside the permitted area. It was improper to revoke the permit based on that use. An enforcement action in relation to the parcel where the use was not permitted is an appropriate remedy. *Bettendorf v. St. Croix County Board of Adjustment*, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999), 98-2327.
- A conditional use permit (CUP) is not a contract. A CUP is issued under an ordinance. A municipality has discretion to issue a permit and the right to seek enforcement of it. Noncompliance with the terms of a CUP is tantamount to noncompliance with the ordinance. *Town of Cedarburg v. Shewczyk*, 2003 WI App 10, 259 Wis. 2d 818, 656 N.W.2d 491, 02-0902.
- A permit issued for a use prohibited by a zoning ordinance is illegal per se. A conditional use permit only allows a property owner to put the property to a use that is expressly permitted, as long as conditions have been met. A use begun under an illegal permit cannot be a prior nonconforming use. *Foresight, Inc. v. Babl*, 211 Wis. 2d 599, 565 N.W.2d 279 (Ct. App. 1997), 96-1964.
- When a village eliminated the selling of cars as a conditional use in general business districts a previously granted conditional use permit (CUP) was voided, the property owner was left with a legal nonconforming use to sell cars, and the village could not enforce the strictures of the CUP against the property owner. Therefore, the owner could continue to sell cars in accordance with the historical use of the property, but if the use were to go beyond the historical use of the property, the village could seek to eliminate the property's status as a legal nonconforming use. *Hussein v. Village of Germantown Board of Zoning Appeals*, 2011 WI App 96, 334 Wis. 2d 764, 800 N.W.2d 551, 10-2178.
- Nothing in s. 59.694 (10) prevented an applicant whose conditional use permit (CUP) was denied from filing a second CUP application rather than seeking certiorari review. A municipality may enact a rule prohibiting a party whose application to the zoning board has been denied from filing a new application absent a substantial change in circumstances, but that was not done in this case. *O'Connor v. Buffalo County Board of Adjustment*, 2014 WI App 60, 354 Wis. 2d 231, 847 N.W.2d 881, 13-2097.

Recent  
court  
case

## *AllEnergy v. Trempealeau County* 2017 WI 52

- County identified 37 conditions for silica sand mine, then voted to deny permit based on public health, safety and aesthetic concerns.
- Wisconsin Supreme Court supported decision to deny.
- Dissenting opinion argued for less discretion for local governments.





# What is the Correct Standard?

Inclusion of a conditional use in the ordinance is a legislative determination that the use is suitable for the district.

- CUP must be granted, except in extreme circumstances.
- Zoning board focuses on what conditions to impose to mitigate negative impacts.

The zoning board has discretion to determine if a proposed use is appropriate for the given site.

- CUP may be granted or denied.
- Zoning board determines if the use is capable of meeting the ordinance standards and what conditions to impose.
- May consider general health, safety and welfare concerns.

# Conditional Uses

New law!  
2017 Wis  
Act 67

2017 Wisconsin Act 67 created new rules for conditional use permits

- Counties Wis. Stat. 59.69(5e)
- Towns Wis. Stat. 60.61(4e), 60.62(4e)
- Cities and Villages Wis. Stat. 62.23(7)(de)

# Conditional Uses

New law!  
2017 Wis  
Act 67

## Definition

“Conditional Use” means a use allowed under a conditional use permit, special exception, or other special zoning permission, but does not include a variance.

# Conditional Uses

New law!  
2017 Wis  
Act 67

## Process

- Class 2 notice, public hearing
- Decision by zoning board
- Appeal to circuit court

Ordinance may specify alternate route, typically:

plan commission → appeal to zoning board  
governing body → appeal to circuit court

(See Wis. Stat. 59.69(2)(bm), 59.694(1), 62.23(7)(e)1)

# Conditional Uses

New law!  
2017 Wis  
Act 67

## Local government responsibilities:

- Ordinance requirements and conditions must be **reasonable** and, to the extent practicable, **measurable**
- Must support decision to approve or deny the permit, and to attach conditions, with **substantial evidence**
- Conditions must relate to the ordinance **purpose**
- Conditions may limit permit duration, transfer, or renewal

# Conditional Uses

New law!  
2017 Wis  
Act 67

## Definition

“Substantial Evidence” means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit, and that reasonable persons would accept in support of a conclusion.

# Conditional Uses

New law!  
2017 Wis  
Act 67

## Applicant responsibilities

- Must demonstrate that the application and all requirements and conditions established by the local government relating to the conditional use are or shall be satisfied
- Must provide substantial evidence supporting the application and demonstrating that the requirements and conditions will be met

# Conditional Uses

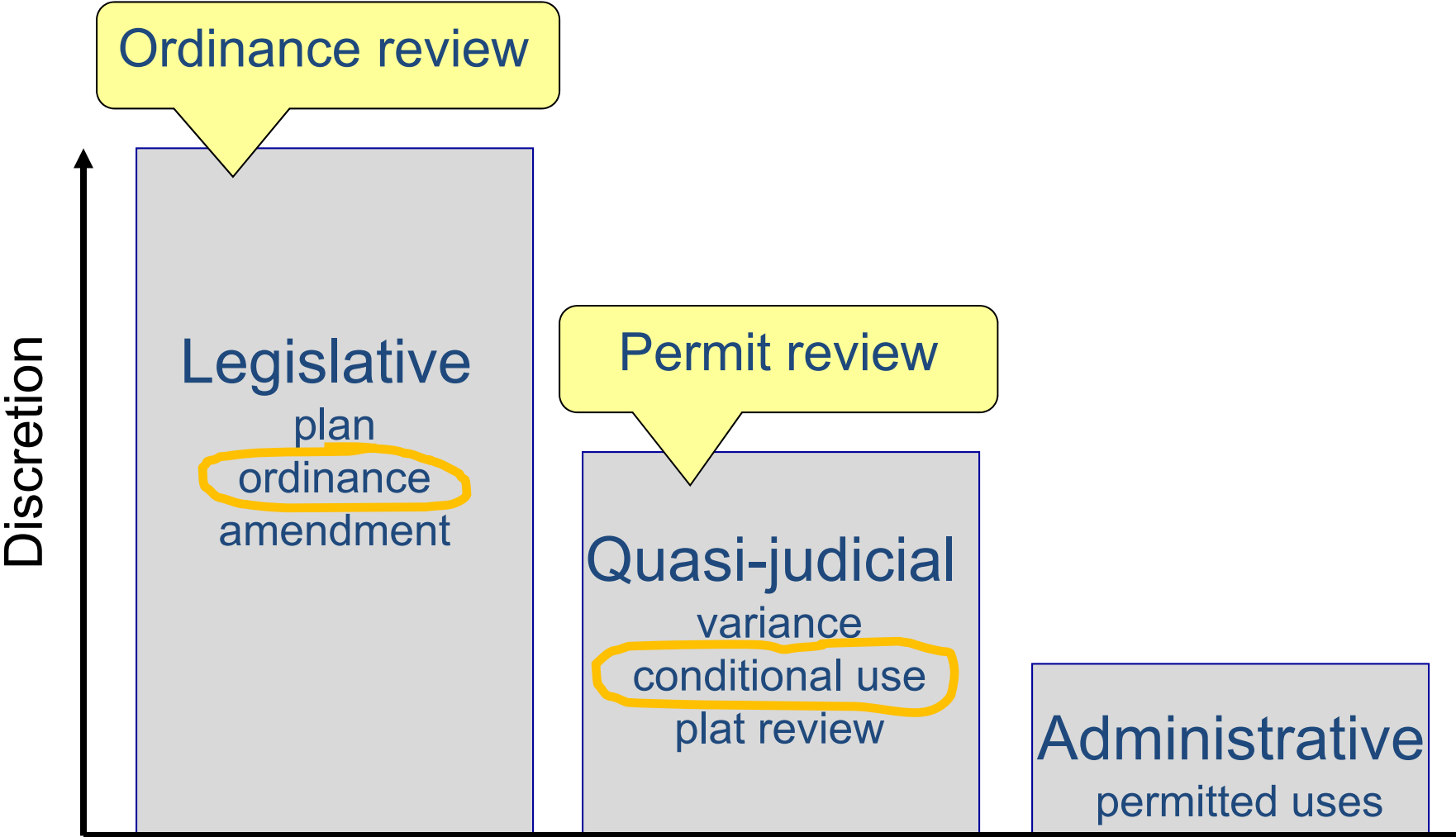
New law!  
2017 Wis  
Act 67

## Permit decision

- If an applicant for a conditional use permit meets or agrees to meet all requirements and conditions specified in the ordinance or imposed by the zoning board, the local government shall grant the conditional use permit



# Discretion Varies with Decision



# Ordinance Review



Review conditional uses listed in your ordinance



Review process for granting conditional uses (class 2 notice, public hearing)



Review standards, requirements and conditions listed in your ordinance



Provide specific authority in your zoning ordinance if you wish to assign review of conditional uses to a body other than the zoning board



Review purpose statements to make sure they support conditions you are likely to attach

# List of Conditional Uses

Title 2: Zoning Districts and Uses

USE	Key:												Development Standards
	P Permitted Use				C Conditional Use				(Blank) Use Not Permitted				
	Residential Districts				Agricultural Districts			Nonresidential Districts					
U-R	L-D-R	R-R	R-E	F-P	G-A	C-V/R-C	N-C	C	B-R	L-I	H-I		
<b>COMMERCIAL, OFFICE, and SERVICE USES</b>													
Adult Entertainment								C					<a href="#">Section 17.204.35</a>
Bank or Financial Institution								P	P	P			
Bar, Tavern, or Micro-Brewery								P	P	P			
Bed and Breakfast			C	C				C					<a href="#">Section 17.204.36</a>
Business Service Establishment								P	P	P			
Car Wash								C	C	C			<a href="#">Section 17.204.37</a>
Drive-Through Facility (accessory to a principle use)								P	P				<a href="#">Section 17.204.38</a>
Gas Station								C	C				<a href="#">Section 17.204.39</a>
Motel or Hotel								C	C	C			
Office, Research, Professional Services								P	P	P	P	P	
Personal Service Establishment								P	P	P			
Gun Ranges							C	C	C				<a href="#">Section 17.204.40</a>
Archery Range							P	P	P				<a href="#">Section 17.204.41</a>
Place of Assembly								C		P	P		<a href="#">Section 17.204.49</a>
Public or Self-Storage								C		P			<a href="#">Section 17.204.42</a>
Recreation, Private Indoor			C	C	C			C	c	P	P		<a href="#">Section 17.204.43</a>




For each district, determine if the use is something you want to keep, eliminate, or allow through a different process.

# General Standards

## Section 17.803.03 BASIS OF DETERMINATION

- A. **Conformance with Requirements.** The applicant shall be required to establish by clear and convincing evidence that the applicable standards of this Chapter, the specific standards pertinent to each conditional use, including site plan review criteria set forth for applicable site development standards for specific uses set forth elsewhere in this Chapter (refer to Chapter [17.204](#), Development Standards for Specific Uses) have been met.
- B. **General Standards.** The Board of Adjustment shall review the particular facts and circumstances of each proposed conditional use in terms of the following standards:
1. **Compatibility with Adjacent Uses.** The proposed conditional use shall be designed, constructed, operated and maintained to be compatible with uses on surrounding land. The site design shall minimize the impact of site activity on surrounding properties. In determining whether this requirement has been met, consideration shall be given to:
    - a. The location and screening of vehicular circulation and parking areas in relation to surrounding development.
    - b. The location and screening of outdoor storage, outdoor activity or work areas, and mechanical equipment in relation to surrounding development.
    - c. The hours of operation of the proposed use. Approval of a conditional use may be conditioned upon operation within specified hours considered appropriate to ensure minimal impact on surrounding uses.
    - d. The bulk, placement, and materials of construction of the proposed use in relation to surrounding uses.
  2. **Comprehensive Plan.** The proposed conditional use will be harmonious with and in accordance with the general objectives or with any specific objective of the town and county comprehensive plan.



Specifically reference the comprehensive plan if you want to consider it in decision-making.

# Standards for Specific Uses

## Section 17.204.36 BED AND BREAKFAST

- A. **Bed and breakfast**, may be located in an, R-R, R-E, G-A, and N-C Districts with the following conditions, and any other specific conditions imposed by the Board of Adjustment:
1. Owner Occupied. The owner must reside at the site and provide proof of residency annually to the Zoning Administrator.
  2. Guests. A maximum of three guest units shall be permitted.
  3. Safety Items. Each facility shall have the following safety items:
    - a. Smoke alarms in each unit;
    - b. Two fire extinguishers, which shall be "abc" rating and one shall be located in the kitchen and one shall be located at main entrance/exit;
    - c. First-aid kit;
    - d. Emergency lighting and/or other safety devices as recommended by the fire chief.
  4. Food Licensing. Food licensing shall be mandated by Marathon County Health Department.
  5. Health and Safety. Home occupancy must meet state health and safety requirements.
  6. Signs. Signage shall be subject to Title 7, Signs.
  7. Limitation on Stay. The same guest or group of registrants shall not stay at the facility for a period of more than seven consecutive days or more than 14 total days within a given calendar year.
  8. Cause for Repeal of Permit. Failure to comply with these conditions and subject to Chapter 254.61 Wisconsin Statutes or other such agencies shall be cause for repeal of the conditional use permit.
  9. Trash. Shall provide central facilities for collection and disposal of trash.
  10. Facility must be ADA compliant.



Consider adding detailed standards for specific uses. Legislatively enacted standards are easier to defend than conditions attached during permit review.

# Purpose Statements

## Chapter 17.803

## Conditional Use Permits

### Section 17.803.01 PURPOSE

- A. **Purpose.** Certain uses are of such a nature or their effects are as dependent upon specific circumstances as to make impractical the determination in advance of where and when and under what conditions they should be permitted. Provision has been made in this chapter for the determination of such uses as conditional uses. Conditional uses are land uses listed as such in [Table 3](#) Uses Permitted by District. They may be established in such district only upon approval by the Board of Adjustment.

The procedures and standards in this Chapter are intended to provide a consistent and uniform method for review of conditional use permit proposals. These review procedures and standards are intended to accomplish the following purposes:

1. Ensure full compliance with the standards contained in this ordinance and other applicable local ordinances, and state and federal laws.
2. Achieve efficient use of the land.
3. Prevent adverse impact on adjoining or nearby properties.
4. Protect natural resources.
5. Facilitate development in accordance with the County's land use objectives per the Comprehensive Plan.



Analyze statements describing the purpose of the zoning ordinance, the purpose of specific zoning districts, and the purpose of specific regulations. They should provide support for conditions you are likely to attach.

# Permit Review



Review proposal against ordinance criteria



Make sure conditions imposed are reasonable, measurable, relate to the ordinance purpose, and are supported by substantial evidence



Determine credibility of information presented



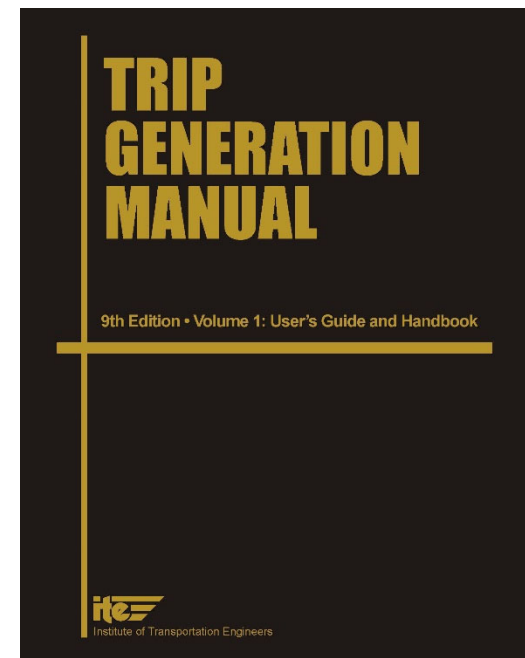
Create an adequate record of your decision to provide support if the decision is appealed



Determine if you will grant or deny based on substantial evidence

# Reasonable, Measurable, Evidence-based?

Local government requires traffic impact analysis with projections based on ITE trip generation rates.





# Reasonable, Measurable, Evidence-based?

Local government requires that 100% of stormwater must be retained on site.



## 2017 WI Act 243

Construction site erosion control and stormwater management ordinances –

May not require more than 90% of predevelopment runoff to be retained on site.

# Reasonable, Measurable, Evidence-based?

Certified wetland delineator verifies location of wetland on the property.



# Reasonable, Measurable, Evidence-based?

Local government requires building or landscaping to be harmonious with surrounding properties.



Aesthetics are a recognized public concern, but more powerful when tied to a public purpose such health, safety, or economics.

Create standards that are measurable and enforceable.

# Reasonable, Measurable, Evidence-based?

Neighbor appears in opposition at public hearing citing decreased property values.



Property values are a legitimate public purpose, but are not guaranteed by zoning.

How do you measure?  
Is the loss speculative?  
Is it a taking?  
Can you craft conditions to minimize impacts?

# Limits on Exactions

1. Essential Nexus – address expected harmful project impacts
2. Rough Proportionality – conditions proportional to impact



(U.S. Supreme Court in Nollan/Dolan)

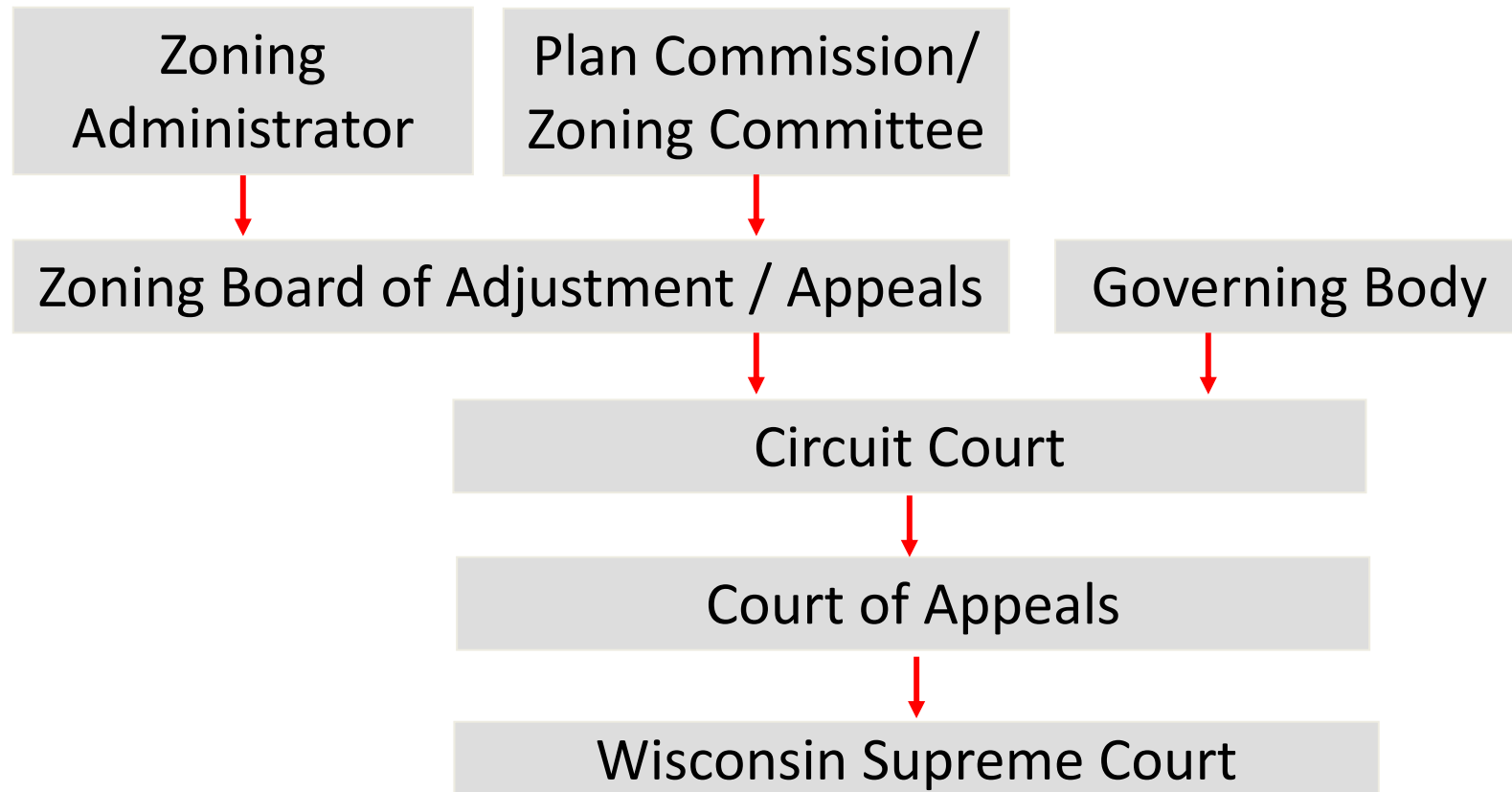
# Reasonable, Measurable, Evidence-based?

368 people speak on record at the public hearing. Most oppose. Can you deny the permit based on opposition?



- Not a popularity contest.
- Weigh the credibility of information presented.
- Provide substantial evidence (facts and information) supporting your decision to grant or deny the permit.
- Cite specific standards and evidence you relied upon.
- Postpone if more time or information is needed.

# Appeal of Zoning Decisions



# Administrative Appeal

(to the zoning board)



# Judicial Appeal

(to circuit court)



WHO

Any aggrieved party, officer, board or oversight agency may appeal

Same + taxpayer

WHEN

Must specify time limit to appeal in local ordinance

30 days from date decision was filed in office of BOA





## Appeal to the Zoning Board

- The zoning board has all of the powers of the body from whom the appeal was taken
- It may review the record or conduct a “de novo” hearing
- May reverse, affirm or modify decision
- Does not send the decision back

- May take evidence
- May reverse, affirm or modify decision
- Overturned decision typically remanded to the zoning board with instructions to decide consistent with the court finding's



Appeal to  
Circuit Court

# Certiorari Review Standards

Courts defer to local decision makers when these tests are met:



Authority

Are you empowered by statute or ordinance to act on the matter?



Proper procedures

Did you follow proper procedures?  
(notice, open meeting, public hearing)



Proper standards

Did you apply the proper standards?  
(ordinance, state statute, case law)



Rational basis

Were you unbiased? Could a reasonable person reach the same conclusion?



Evidence

Do facts in the record support your decision?

# Quasi-Judicial Decisions

- Avoid ex-parte communication
- Remain unbiased in decision-making
- Apply ordinance standards
- Provide evidence supporting your decision
- *Make sure that everything a judge would need to support your decision makes it into the public record*

# New Standards for Conditional Uses

The zoning board has discretion to determine if a proposed use is appropriate for the given site.

- CUP may be granted or denied.
  - Zoning board determines if the use is capable of meeting the ordinance standards and what conditions to impose.
  - May consider general health, safety and welfare concerns.
- Local government must provide substantial evidence supporting its decision to grant or deny the permit and to attach conditions.
  - Requirements and conditions found in the zoning ordinance or imposed by the local government must be reasonable, and to the extent practicable, measurable.
  - Any condition imposed must relate to the ordinance purpose.
  - If the applicant meets, or agrees to meet the requirements and conditions, the local government shall grant the permit.

# Application and Decision Forms

**Decision**

(See Handout)

If an applicant for a conditional use permit meets, or agrees to meet, all of the requirements found in the zoning ordinance and all conditions imposed on the permit, the local government is required to grant the permit.

Based on the above findings of fact, conclusions of law, and the record in this matter, the permit is:

- Approved, with the conditions stated above.
- Denied, for the following reasons:

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Signature of local government

Date

# Thank You!

Rebecca Roberts  
Center for Land Use Education  
[www.uwsp.edu/cnr-ap/clue](http://www.uwsp.edu/cnr-ap/clue)  
[rroberts@uwsp.edu](mailto:rroberts@uwsp.edu)  
715-346-4322



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